February 6, 2013

Via Electronic Filing ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: ***AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *Connect America Fund*, WC Docket No. 10-90**

Dear Ms. Dortch:

Level 3 Communications, LLC ("Level 3") submits this letter in response to AT&T's *ex parte* filing dated January 14, 2013 in WC Docket 05-25.[1]

AT&T's January 14 filing is part of its ongoing campaign to have the FCC completely abrogate its competitive regulatory framework, which AT&T claims will "facilitate and thus hasten" the transition to IP networks.[2] In an *ex parte* filing dated August 30, 2012, AT&T asked the Commission, *inter alia*, to (1) establish "a date certain for an official TDM-services sunset" and (2) classify IP services as information services not subject to interconnection or other common carrier or competitive requirements.[3] Similarly, on November 7, 2012, AT&T filed a "Petition to Launch a Proceeding Concerning the TDM-to-IP Transition," wherein it described the costs to ILECs of maintaining TDM networks and asked the Commission to dismantle its pro-competitive regulations by, most significantly, classifying IP-enabled services, including VoIP, as information services.[4]

The fact that this transition can even be contemplated at this time is because of, not in spite of (as AT&T presumes), the pro-competitive policies the Commission implemented following passage of the Telecommunications Act of 1996. What the transition will mean for consumers, and for the U.S. economy at large, in the years ahead will depend on the Commission: (1) ensuring that fostering facilities-based competition remains central to its

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1 *See* Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (Jan. 14, 2013) ("AT&T January 14 *Ex Parte*").

2 Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC (Aug. 30, 2012), at 2.

3 *Id.*

4 Petition to Launch a Proceeding concerning the TDM-to-IP Transition, Nov. 7, 2012.

regulatory paradigm; and (2) taking action where it has yet to do so to eliminate existing barriers to facilities-based competition (such as by restricting the incumbent telephone companies' use of special access demand lock-up arrangements).

Level 3 has joined with a coalition of competitive carriers in submitting comments in GN Docket No. 12-353 on AT&T's November 7, 2012 petition and a petition filed by the National Telecommunications Cooperative Association ("NTCA") concerning the TDM-to-IP transition.[5] In those comments, the competitive carriers suggested a set of milestones the Commission should establish in updating its competition policies in order to lay the groundwork for the transition to a packet-mode world.[6] The competitive carriers also, in addressing the issues related to the proposals in the AT&T and NTCA petitions, responded to AT&T's January 14 *ex parte* letter[7] and several mischaracterizations AT&T made concerning the competitive carriers' previous advocacy related to the TDM-to-IP transition.[8]

In addition to the points the competitive carriers made jointly in their comments, Level 3 responds separately here to certain assertions AT&T makes in its January 14 letter concerning the use of existing IP peering arrangements as a model for interconnection following the transition away from TDM. In Section 3 of its letter, AT&T offhandedly rejects the need for any FCC requirement that ILECs interconnect with CLECs in a packet-mode environment.[9] AT&T says that "CLECs present IP-to-IP interconnection as a futuristic endeavor that could never succeed in the absence of regulatory compulsion" and goes on about the existence "for decades" of unregulated peering arrangements under which "the entire world found a way to interconnect to create the Internet."[10] While AT&T has a point respecting the success of unregulated interconnection on the Internet backbone (where competition abounds), its argument misses the mark by a wide margin with respect to the Internet's bottleneck access networks.

Access to Internet end users[11] in today's communications marketplace is controlled largely by incumbent providers, such as the incumbent telephone companies and the incumbent

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5 *See* Comments of Cbeyond, EarthLink, Integra, Level 3, and tw telecom, GN Docket No. 12-353 (Jan. 28, 2013).

6 *See id*. at 2, 10-16.

7 *See id*. at 3-4.

8 AT&T's mischaracterizations concern the December 4, 2012 *ex parte* letter of Cbeyond, EarthLink, Integra and tw telecom in WC Docket No. 10-90, et al. *See* Letter from Thomas Jones, Willkie Farr & Gallagher LLP, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al. (Dec. 4, 2012).

9 AT&T January 14 *Ex Parte* at 5.

10 *Id*.

11 "End users" in this context included both individual consumers and business users.

cable companies,[12] due in large measure to their complete control over the last-mile facilities required to reach these end users. This makes these providers literal gatekeepers controlling what information they will and will not allow to pass over their networks and the terms and conditions on which they will allow that data to flow. In an unregulated environment, this dynamic has not worked nearly as well as AT&T would have the Commission believe.

The unilateral gatekeeper problem is illustrated by the continuing situation involving Level 3 and Comcast, which Level 3 has brought to the FCC's attention on several prior occasions.[13] It was also illustrated in the "sending party pays" arguments advanced by some at the recently concluded World Conference on International Telecommunications. These "sending party pays" positions were defeated, in part, because the U.S. delegation, along with many in Europe, opposed them. And the gatekeeper problem is illustrated by AT&Ts own recent conduct.

In much the same way as Comcast has historically, AT&T is currently demanding "tolls" from Level 3 before it will augment interconnection capacity between the AT&T and Level 3 networks. Absent such payments, AT&T is intentionally allowing interconnection points (which are used to reach the AT&T bottleneck access network) to congest, degrading the quality of Internet content that AT&T's Internet subscribers have requested.[14] Others have raised similar concerns about AT&T regarding, for example, AT&T's decision last year to block customers from using Apple's Facetime application absent their purchase of more expensive AT&T data plans.[15] There are simply too many instances of this sort of unilateral gatekeeping

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12 This is also becoming more and more true in the case of wireless networks as wireless spectrum is continually consolidated into the hands of a limited few providers.

13 *See* Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al.* (Feb. 22, 2011); Letter from John M. Ryan, Level 3, to Julius Genachowski, FCC, GN Docket No. 09-191, *et al.* (Feb. 17, 2011); Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, et al. (Jan. 14, 2011); Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al.* (Dec. 14, 2010); Letter from Bob Yates, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al*. (Dec. 10, 2010); Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al*. (Dec. 7, 2010); Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al.* (Dec. 3, 2010); Letter from John M. Ryan, Level 3, to Marlene H. Dortch, FCC, GN Docket No. 09-191, *et al*. (Nov. 30, 2010).

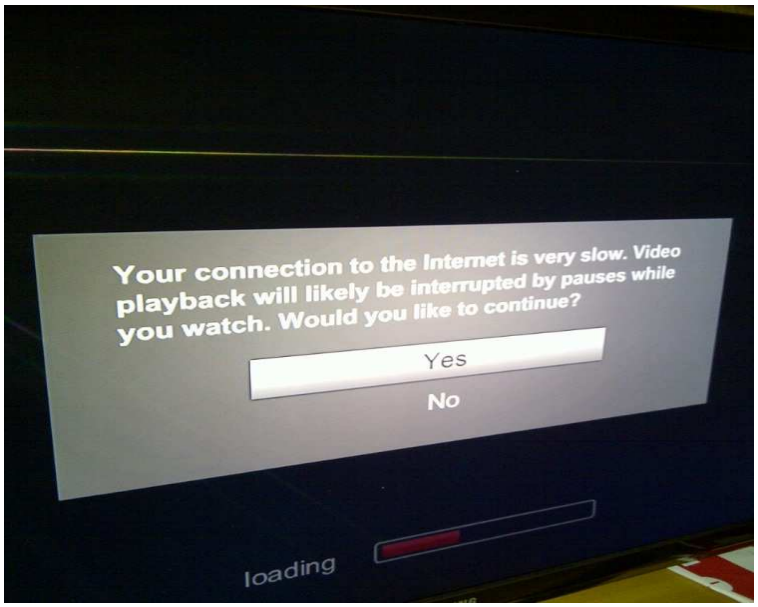
14 Level 3 raised these same "gatekeeper" concerns in connection with the AT&T and Verizon spectrum transactions the Commission approved last year. *See* Comments of Level 3, WT Docket No. 12-240 (Oct. 1, 2012) at 3-8; Reply Comments of Level, WT Docket No. 12-4 (Mar. 26, 2012) at 2-7.

15 *See* Howard Buskirk, "FaceTime Complaint Could Be First Major Test of FCC Net Neutrality Rules," *Communications Daily* (Sept. 19, 2012).

conduct by AT&T (and other incumbents) to ignore the effect this same sort of conduct would have in an unregulated, packet-mode landscape.

Level 3 submitted comments last year in WT Docket No. 12-240 concerning AT&T Wireless' recent acquisition of additional wireless spectrum.[16] In those comments, Level 3 demonstrated that the interconnection capacity between the Level 3 and AT&T networks reaches capacity, and congests, *daily* in almost all locations as a result of AT&T's consistent refusal for more than a year to add capacity to these interconnection points on the same settlement-free terms as our existing interconnection ports or on the equitable bit-mile peering terms Level 3 has repeatedly proposed to AT&T.[17] Daily congestion is still occurring.

Level 3 also provided confidential information showing congestion and packet loss in Level 3's links with AT&T in various locations, and the impact such congestion has on the individual Internet users' experience.[18] As a visual example, when packet loss occurs, subscribers may receive messages like the one below:



When receiving messages like this one, many Internet users, who remember the "good ol' dial up days," may think that these messages are just a fact of life when using the Internet. Or—they could be the result of the incumbents intentionally allowing Internet congestion, hoping to leverage that congestion in an effort to extract tolls out of content providers or their vendors before they will augment interconnection capacity. In other words, the incumbents are trying to force other providers into "sending party pays."

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16 *See* Comments of Level 3, WT Docket No. 12-240 (Oct. 1, 2012).

17 *See id*. at 3-8.

18 *See id.*

Congested Internet access networks also have an additional, follow on impact that negatively affects both network operators and consumers. This is best explained through an example. Say Internet traffic on the Level 3 network is destined for AT&T customers in New York City, but interconnection capacity between the AT&T access network and the Level 3 network is congesting in New York. In this case, the Level 3 network will look for other interconnection locations with AT&T that are not congesting at the time, say in Dallas, and deliver the traffic to AT&T there. This is bad for Level 3, as it must incur the network cost to haul this traffic on its network from New York to Dallas. It is also bad for AT&T, because AT&T would then need to incur the network cost to haul the traffic on the AT&T network from Dallas all the way back up to New York. In other words, the traffic is run in a useless and expensive circle for no reason. This circuitous traffic routing is also bad for Internet consumers, because every mile of distance Internet packets must travel between their source and their destination adds what is known as "latency" to the traffic delivery, and increased latency on Internet traffic negatively impacts the quality of the end user experience. Not only is this added latency hard to justify from an Internet subscriber perspective, but it is difficult to understand why AT&T would intentionally add to its own network costs in this way unnecessarily.

AT&T is currently demanding onerous payments from Level 3, and possibly others, that deliver content bound for AT&T's customers before it will agree to add interconnection capacity to its access network in areas that routinely congest. As discussed above, AT&T has allowed the interconnection points between Level 3 and AT&T to become congested, degrading quality. AT&T has, in essence, taken the Internet hostage in an effort to force Level 3 into paying its tolls as ransom. AT&T has the power to do this because it controls the exclusive means of access to millions of Internet customers and the corresponding ability to act as a gatekeeper with respect to any Internet content they request.

The voluntary, unregulated peering environment AT&T touts as a substitute for regulated interconnection can obviously have significant problems, as discussed above. This is particularly apparent where bottleneck access networks exist. The extreme generalization that "the Internet works fine without regulation" should not serve as a model for the Commission as it explores ways to transition away from TDM networks. Only by updating its competition policies to include the need for packet-mode interconnection under fair and non-discriminatory rates, terms and conditions will the Commission ensure that competition flourishes following the TDM-to-IP transition.

In the event there are questions concerning this matter, please contact the undersigned.

Respectfully submitted,

/s/ Michael J. Mooney

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